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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 DOMESTIC CONSTRUCTION, LLC,

12 Plaintiff,

13 v.

14 BANK OF AMERICA, N.A.,

15 Defendant/Third-
16 Party Plaintiff,

17 v.

18 IDEAL SERVICES, INC.,

19 Third-Party
20 Defendant/Fourth-
21 Party Plaintiff,

22 v.

23 KERMIT MILLS and JANE DOE
24 MILLS, and the marital community
25 comprised thereof,

26 Fourth-Party
27 Defendants,

28 CASE NO. CV07-5357BHS

ORDER GRANTING THIRD-
PARTY DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT, DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT,
AND DENYING FOURTH-
PARTY DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

This matter comes before the Court on Third-Party Defendant's motion for partial summary judgment (Dkt. 125), Plaintiff's motion for summary judgment (Dkt. 123), and Fourth-Party Defendant's Motion for Summary Judgment (Dkt. 122). The Court has considered the pleadings filed in support of and in opposition to the motions and the

1 remainder of the file and hereby grants Third-Party Defendant's motion, denies Plaintiff's
2 motion, and denies Fourth-Party Defendant's motion for the reasons stated herein.

3 **I. PROCEDURAL HISTORY**

4 On December 12, 2006, Plaintiff Domestic Construction, LLC, ("Domestic") filed
5 a complaint in the United States District Court for the Middle District of Louisiana
6 against Defendant Bank of America. Dkt. 52-4. Plaintiff requests damages for violations
7 of common law conversion, negligence, failure to act in accordance with reasonable
8 commercial standards, the Uniform Commercial Code ("UCC"), and bad faith. *Id.*

9 In February of 2007, Defendant answered the complaint and filed a third-party
10 complaint against Third-Party Defendant Ideal Services, Inc. ("Ideal"). Dkt. 52-11.
11 Defendant alleges that Ideal may be liable for breach of warranty under UCC 3-416 and
12 UCC 4-207, conversion, unjust enrichment, intentional or negligent misrepresentation,
13 contribution/indemnity, and equitable indemnification. *Id.*

14 On July 16, 2007, the matter was transferred to this Court and assigned to the
15 undersigned. Dkts. 52-55.

16 On December 4, 2007, Ideal answered the third-party complaint, filed a cross-
17 claim against Plaintiff, and filed a fourth-party complaint against Fourth-Party
18 Defendants Kermit Mills and Jane Doe Mills. Dkt. 66.

19 On March 3, 2008, Plaintiff answered Ideal's cross-claim and filed a counterclaim
20 against Ideal. Dkt. 73. Plaintiff alleges that (1) Ideal converted negotiable instruments
21 held by Plaintiff; (2) Ideal received funds by way of intentional or negligent
22 misrepresentations to Defendant Bank of America; (3) Ideal violated UCC provisions
23 governing negotiable instruments; (4) Ray Salzer defamed Plaintiff causing the loss of
24 numerous contracts; (5) Ideal and/or Ray Salzer intentionally interfered with Plaintiff's
25 contracts; (6) Ideal, Ray Salzer and/or Sue Erb breached fiduciary duties owed to
26 Plaintiff; and (7) Ray Salzer employed a fraudulent scheme to deprive Plaintiff of money
27 and contracts. *Id.* at 9-14.

On June 24, 2009, Defendant filed a Motion for Summary Judgment (Dkt. 120) and Ideal filed a Motion for Summary Judgment (Dkt. 125). On July 13, 2009, Plaintiff responded to both motions. Dkt. 131. On July 17, 2009, Defendant replied (Dkt. 138) and Ideal replied (Dkt. 139).

On June 24, 2009, Plaintiff filed a Motion for Partial Summary Judgment Finding that Bank of America Acted Negligently. Dkt. 124. On July 13, 2009, Defendant responded. Dkt. 132. Plaintiff did not reply.

On June 24, 2009, Kermit Mills filed a Motion for Summary Judgment. Dkt. 122. On July 13, 2009, Ideal responded. Dkt. 135. Plaintiff did not reply.

On June 24, 2009, Plaintiff filed a Motion for Partial Summary Judgment Finding Kermit Mills to be the Sole Member of Domestic Construction, LLC. Dkt. 123. On July 13, 2009, Ideal responded. Dkt. 133. Plaintiff did not reply.

On June 24, 2009, Ideal filed a Motion for Partial Summary Judgment. Dkt. 125. On July 13, 2009, Plaintiff and Mr. Mills responded. Dkt. 131. On July 17, 2009, Ideal replied. Dkt. 139.

On August 26, 2009, the Court issued an Order granting Defendant Bank of America's Motion for Summary Judgment (Dkt. 120) and denying Plaintiff's Motion for Partial Summary Judgment Finding that Bank of America Acted Negligently (Dkt. 124). Dkt. 171.

II. FACTUAL BACKGROUND

On October 5, 2004, Kermit Mills registered Domestic Construction, LLC, with the Louisiana Secretary of State. Dkt. 131-2, Declaration of Kermit Mills (“Mills Decl.”), ¶ 2. In late 2004 or early 2005, Kermit Mills approached Ray Salzer regarding “the possibility of selling a non-controlling interest in Domestic Construction, LLC.” *Id.* ¶¶ 3-5. At that time, Mr. Salzer was the president of Ideal and Sue Erb was the controller of Ideal. Dkt. 125 at 4.

1 The parties dispute whether an agreement or partnership was ever formed between
2 either Mr. Salzer or Ideal and Plaintiff. Although Mr. Mills and Mr. Salzer exchanged
3 multiple proposed agreements, it is undisputed that they did not sign a final business
4 agreement. They did, however, engage in various construction projects based on oral
5 representations and provisions of those proposed agreements. For example, in his
6 deposition, Mr. Mills stated that:

7 [Mr. Salzer] was supposed to handle everything and at the end of day [sic],
8 we were supposed to be splitting 49/51 percent profit of the company with
9 all upfront stuff . . . supposed to be done by Ray Salzer for Domestic.

10 Dkt. 121, Declaration of William K. Rasmussen (“Rasmussen Decl.”), Exh. 1, Deposition
11 of Kermit Mills (“Mills Dep.”), at 354-55 (deposition pagination). Moreover, in the
12 30(b)(6) deposition of Domestic, Mr. Mills stated that Ideal obtained insurance for
13 Domestic, maintained a bond for Domestic, and opened credit accounts in the name of
14 “Ideal d/b/a Domestic Construction.” Dkt. 126, Declaration of Christina Gerrish Nelson
15 (“Nelson Decl.”), Exh. B.

16 On March 25, 2005, Mr. Mills sent Mr. Salzer and Ms. Erb a brochure for
17 Domestic. Under the “Company Information” section, the brochure reads in part as
18 follows:

19 Domestic Construction was founded by Kermit Mills (former
20 Vice-President of operations and project manager) who brings over 13 years
21 of experience to the construction industry. Domestic Construction LLC was
22 formed to become a one stop source for retailers. In order to provide our
23 clients the entire services they require under one entity, Kermit Mills
24 teamed up with Ray Salzer, owner of Ideal Services and Ricky Davis,
25 owner of Alpheaus Davis, House of Colors and Boley Designs as a joint
26 venture to form Domestic Construction LLC, a general contractor and
27 construction firm. With offices located in Louisiana as well as the Pacific
28 Northwest region, Domestic Construction LLC is a diversified construction
company developing expertise in a wide range of areas allowing us to
operate with a reputation for dependability.

Nelson Decl., Exh. C. Under the “Company Contacts” section, Mr. Mills is listed as
President and Mr. Salzer is listed as President of Northwest Operations. *Id.*

In June 2005, Domestic filed a Foreign Limited Liability Company Registration
with the Washington Secretary of State. Dkt. 134, Second Declaration of Christina

1 Gerrish Nelson, Exh. A. The Initial Annual Report cover sheet lists Mr. Mills, Mr.
2 Salzer, and Ms. Erb as members of the foreign LLC. *Id.* On October 2, 2006, the
3 Secretary of State revoked Domestic's authority to do business in Washington. *Id.*

4 In their briefing on the pending dispositive motions, Domestic and Mr. Mills claim
5 that "whether [Mr.] Mills and [Mr.] Salzer formed some type of partnership or joint
6 venture is simply irrelevant and constitutes a red herring . . ." Dkt. 131 at 4. In his
7 declaration that was submitted in opposition to Defendant's and Ideal's motions, Mr.
8 Mills maintains that he was the sole member of Domestic. Mills Decl. ¶ 9. Moreover, he
9 claims that he "has never had any intention of forming a partnership between himself and
10 Ray Salzer or Ideal Services, Inc." *Id.* ¶ 13. Although Mr. Mills admits that, in the
11 course of business, he referred to Mr. Salzer as his partner, Mr. Mills claims that he was
12 merely using "informal vernacular." *Id.* ¶ 16.

13 It is undisputed that, at all relevant times, both Domestic and Ideal had bank
14 accounts with Defendant. Defendant has submitted its agreement with Domestic that is
15 titled "Business Financial Relationship Agreement." Rasmussen Decl., Exh. C. The
16 document lists three persons under the "Deposit Account Signature Card" portion: Susan
17 Erb, Mr. Salzer, and Mr. Mills. *Id.* All three signed the document in two separate places.
18 *Id.*

19 Defendant has also submitted Ideal's account agreement and Ideal's Washington
20 Business License. *Id.*, Exhs. D, E. The agreement lists Mr. Salzer and Ms. Erb as
21 authorized persons on the accounts, and one of the FirstChoice Business accounts is titled
22 "Domestic Con." *Id.*, Exh. D. With regard to the business license, one of Ideal's
23 registered trade names was "Domestic Construction." *Id.*, Exh E.

24 Over the next year or so, Domestic (using Ideal's employees) performed
25 construction projects for Home Depot and other companies. All costs were fronted by
26 Ideal, with the expectation and understanding that Ideal would be paid back for all such
27 costs. *See* Mills Dep. at 238, 275, 497. Moreover, all accounting and related financial
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operations for Domestic were handled by Mr. Salzer and Ms. Erb out of an office in Tacoma, Washington, which was in the same office space used by Ideal. *See* Mills Dep. at 74-76, 80-81, 438-439. Home Depot paid for some of the projects with checks that were payable to “Domestic Construction, LLC.” *See id.*, Exh F. These checks were deposited over a four-month time period from February to May of 2006. *Id.* Under the endorsement portion of these checks, it reads “Pay to the Order of Bank of America . . . For Deposit Only, Ideal Services Inc. Accounts Payable.” *Id.*

Ideal claims that Mr. Mills used funds from Domestic’s bank accounts to cover various expenses. Dkt. 135 at 3-4. Specifically, Ideal alleges that:

As Mills’ and Domestic’s bank records make clear, the personal expenses Mills paid out of the Louisiana Domestic accounts included thousands of dollars in checks that Mills wrote to himself (to either “Kermit Mills” or “Cash”); thousands of dollars to car payments for a new Mercedes and other car payments; thousands of dollars in home payments; child support payments; insurance payments; telephone bill payments; household items; lawn care payments; jewelry; travel; and even checks to other businesses owned by Mills. Mills also wrote numerous checks to both his fiancee and his family members.

Id. (citing Dkt. 136, Declaration of Christina Gerrish Nelson, Exh. A., Deposition of Kermit Mills at 136-183 (deposition pagination)). Ideal also claims that “in 2006, Mills’ business and personal tax return was filed jointly, as a Form 1090.” *Id.*

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*

1 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
2 present specific, significant probative evidence, not simply “some metaphysical doubt”).
3 See also Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if
4 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
5 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
6 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
7 626, 630 (9th Cir. 1987).

8 The determination of the existence of a material fact is often a close question. The
9 Court must consider the substantive evidentiary burden that the nonmoving party must
10 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
11 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
12 issues of controversy in favor of the nonmoving party only when the facts specifically
13 attested by that party contradict facts specifically attested by the moving party. The
14 nonmoving party may not merely state that it will discredit the moving party’s evidence at
15 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*
16 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, nonspecific
17 statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan*
18 *v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

19 **B. Ideal’s Motion**

20 Ideal requests “dismissal of all claims alleged by Domestic that rest on the baseless
21 allegation that Ideal, [Mr.] Salzer, and [Ms.] Erb lacked authority to act on behalf of
22 Domestic.” Dkt. 139 at 2. Ideal argues that “Domestic cannot prove the essential
23 elements of its claims of Conversion, Misrepresentation, Breach of UCC, or Fraud” and
24 therefore “[a]ll of these claims should be dismissed as a matter of law.” Dkt. 125 at 19-
25 20.

26 Plaintiff argues that there was neither a partnership nor a joint venture between
27 Domestic and Ideal and that neither Mr. Salzer nor Ms. Erb had authority to deposit the
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1 checks from Home Depot. Dkt. 131 at 13-27. The Court, however, has already found
2 that a joint venture existed between Domestic and Ideal and, in the alternative, that Mr.
3 Salzer and Ms. Erb had actual, implied, or apparent authority to negotiate the checks in
4 question. Dkt. 171. Based on these findings, Plaintiff's arguments to the contrary are
5 unpersuasive. Moreover, Plaintiff has failed to articulate any other basis in fact or in law
6 for the claims that Ideal has challenged. Therefore, Plaintiff has failed to meet its burden
7 and the Court grants Ideal's motion for partial summary judgment. Plaintiff's claims
8 against Ideal for Conversion, Misrepresentation, Breach of UCC, and Fraud are
9 dismissed.

10 **C. Domestic's Motion**

11 Domestic requests that the Court enter an order finding that "neither Ray Salzer
12 nor Ideal Services, Inc. has ever been a member in Domestic Construction, LLC." Dkt.
13 123 at 2. Ideal contends that there exists a question of material fact on this issue because
14 "Domestic registered in Washington as a Foreign Corporation showing three Members:
15 Ray Salzer, Susan Erb, and Kermit Mills." Dkt. 133 at 4. The Court agrees that this
16 registration raises a question of material fact as to the members of Domestic Construction,
17 LLC. Therefore, Domestic's motion is denied.

18 **D. Mr. Mills' Motion**

19 Mr. Mills requests that the Court enter an order granting him summary judgment
20 on the following issues: (1) whether he is subject to personal liability in this matter, and
21 (2) whether he owed a fiduciary duty to Ideal. Dkt. 122 at 2. Ideal argues that material
22 issues of fact exist that preclude judgment as a matter of law. Dkt. 135. Mr. Mills failed
23 to reply.

24 Under Washington law, members and managers of a limited liability company may
25 not be held personally liable for the company's debts, obligations, and liabilities. RCW
26 25.15.125(1). There are exceptions to this general rule. For example, an individual
27 member is personally liable for his or her own torts. RCW 25.15.125(2). A member is

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1 also liable for contributions to which they have agreed and for the return of distributions
2 made while the limited liability company is insolvent or which render the limited liability
3 company insolvent if the member knew the distribution was wrongful. RCW
4 25.15.195(1), .235(2). Under RCW 25.15.060, a member may also be liable under the
5 theory of piercing the veil of the limited liability company if respecting the limited
6 liability company form would work injustice, in the same way that an individual may be
7 personally liable under the theory of piercing the corporate veil.

8 In general, to pierce the corporate veil a plaintiff must show that the corporate
9 form was used to violate or evade a duty and that the corporate veil must be disregarded
10 in order to prevent loss to an innocent party. *Wash. Water Jet Workers Ass'n v.*
11 *Yarbrough*, 151 Wn.2d 470, 503 (2004).

12 In this case, numerous questions of fact exist regarding the business relationship of
13 Domestic, Ideal, and Mr. Mills that preclude ruling as a matter of law that Mr. Mills is not
14 personally liable in this action. For example, Ideal has submitted admissible evidence
15 that Mr. Mills commingled a significant amount of Domestic's business assets with his
16 personal assets. This evidence could be considered a disrespect for the corporate form.
17 Therefore, the Court finds that there exists a question of fact whether Mr. Mills is
18 personally liable in this matter and denies Mr. Mills' motion on this issue.

19 With regard to the issue of whether Mr. Mills owed a fiduciary duty to Ideal, the
20 Court has found that Domestic and Ideal operated a joint venture to complete certain
21 construction projects in Washington. The Court has also found that there exist questions
22 of fact on the issues of (1) whether Mr. Mills was the sole member of Domestic and (2)
23 whether Mr. Mills commingled Domestic's assets with his personal assets. At this point,
24 it is impossible to rule as a matter of law that Mr. Mills does not owe a fiduciary duty to
25 Ideal because of these questions of fact. Therefore, the Court denies Mr. Mills' motion
26 on the issue of whether he owes a fiduciary duty to Ideal.

Finally, the Court encourages the parties to seek mitigation of the accounting issues that remain in this matter.

IV. ORDER

Therefore, it is hereby

ORDERED that Third-Party Defendant's motion for partial summary judgment (Dkt. 125) is **GRANTED**, Plaintiff's motion for summary judgment (Dkt. 123) is **DENIED**, and Fourth-Party Defendant's Motion for Summary Judgment (Dkt. 122) is **DENIED**.

DATED this 1st day of September, 2009.



BENJAMIN H. SETTLE
United States District Judge